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NO. 85-1256 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court of Appeals For The Fourteenth Supreme Judicial District of Texas

APPELLANT'S REPLY MEMORANDUM

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APPELLANT'S REPLY MEMORANDUM

I. APPELLANT TIMELY PRESENTED THE FEDERAL QUESTION IN THE TEXAS COURTS.

Appellee (the "County") contends that this Court has no jurisdiction over Appellant's ("Comstock") appeal because Comstock did not assert in the trial court the constitutional insufficiency of the condemnation procedure used to take her property. The County argues that, under Texas case law, the unconstitutionality of a statute must always be asserted in the trial court. Under well-settled

Texas law, however, whenever the constitutionality of a statute becomes *necessary* to a decision of a case, the Texas appellate courts "always adjudicate whether a statute is constitutional . . . regardless of when or how the question is raised." *Gohlman, Lester & Company v. Whittle,* 114 Tex. 548, 559-560, 273 S.W. 808 (1925); *Lovejoy v. Lillie,* 569 S.W.2d 501, 503 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). The unconstitutionality of the statute need not even have been pleaded in the trial court. *Terrell v. Middleton,* 108 Tex. 14, 19, 191 S.W. 1140 (1916).

Here, the constitionality of the condemnation procedure did not become necessary to the disposition of this case until the Houston Court of Appeals reversed the trial court's judgment solely on the County's Point of Error No. 1. Point of Error No. 1 asserted that "The trial court erred in granting the bill of review and setting aside the judgment on the award *because* [*Comstock's*] *grounds of failure to receive notice of the filing of the special commissioners' award is not as a matter of law grounds for a bill of review where both* [*Comstock*] *and her attorney attended the special commissioners' hearing*". (Emphasis added). The trial court had ruled that Comstock was entitled to a bill of review setting aside the special commissioners' award because of the wrongful conduct of the County's attorney in failing to notify Comstock and her attorney of the filing of the award. Thus, the issue of whether the condemnation procedure was constitutional was *not* necessary to the trial court's judgment.

However, once the Houston Court of Appeals reversed Comstock's bill of review, the issue of whether the Due Process Clause of the Fourteenth Amendment and the

Just Compensation Clause of the Fifth Amendment required that Comstock be notified by reasonable means of the filing of the special commissioners' award became unavoidable and necessary to the decision of this case. At the first opportunity, Comstock, on Motion for Rehearing, expressly raised this constitutional issue, and under the decisions of *Gohlman* and *Terrell,* the Houston Court of Appeals, by overruling the Motion for Rehearing, is presumed to have adjudicated that issue against her. *See also Bragg v. Weaver,* 251 U.S. 57, 58 (1919).

II. THERE IS NO ADEQUATE INDEPENDENT STATE LAW GROUND TO UPHOLD THE JUDGMENT OF THE HOUSTON COURT OF APPEALS.

In contending that there exists an adequate, independent state law ground upholding the judgment of the Houston Court of Appeals, the County argues that its failure to notify Comstock of the filing of the special commissioners' award is not recognized as a ground for equitable relief under Texas law, because the condemnation procedure did not require that such notice be given. Of course, the County's argument is totally beside the point. Comstock's position is that the condemnation procedure was unconstitutional precisely because it failed to contain a statutory mechanism requiring the County to notify Comstock of the filing of the special commissioners' award.

The County also seems to contend that, while allegations of fraud, mistake, or accident may invoke equitable review powers, the Houston Court of Appeals found no evidence to support Comstock's contention that the special commissioners' award was filed without notice to her as a result of the County's wrongful conduct.

Contrary to the County's assertions, however, the actual basis for the Houston Court of Appeals' judgment was the absence of a notice requirement in the condemnation procedure. As shown above, the sole Point of Error sustained by the Houston Court of Appeals was the County's Point of Error No. 1. It did not sustain any of the County's other Points of Error, which asked the Court to set aside the trial court's findings of fact and conclusions of law that the County's attorney made representations that he would notify Comstock and her attorney of the filing of the special commissioners' award; that Comstock's failure to receive notice was the result of fraud, accident, or mistake; that Comstock was not negligent or otherwise at fault in failing to receive notice; and that Comstock's failure to receive notice was not in any way colored by her negligence or fault.

Moreover, even if the judgment of the Houston Court of Appeals was based upon the absence of wrongful conduct on the County's part, that basis would not constitute an adequate, independent state law ground precluding this Court's review, since Comstock and her attorney's misplaced reliance upon the County attorney's representations would not have occurred if a statutory provision had existed requiring the County to notify Comstock of the filing of the award.

III. APPELLANT WAS DENIED DUE PROCESS OF LAW AND JUST COMPENSATION BECAUSE OF THE ABSENCE OF NOTICE.

The County claims that this Court's decisions in *Bragg v. Weaver,* 251 U.S. 57 (1919), and *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925) are distinguishable from this case, because

Comstock and her attorney were present at the special commissioners' hearing and were therefore chargeable with notice of the subsequent filing of the award. In both cases, however, this Court recognized that a notice problem of substantial constitutional dimensions is presented when, as here, the condemning authority makes its appealable ruling in the landowner's absence.

The County also cites cases to this Court that are completely immaterial to the constitutional question at issue. Whether or not the Texas courts have held that an appearance at a special commissioners' hearing waives any complaint as to lack of notice has no bearing on the question at issue of whether the federal Constitution required notice of subsequent events, knowledge of which by the landowner was necessary for her to continue the proceedings for determining just compensation by invoking judicial review of the special commissioners' award.

IV. CONCLUSION.

The constitutional question of whether the Due Process Clause and Just Compensation Clauses of the federal Constitution required the County to notify Comstock and her attorney of the filing of the special commissioners' award is properly before this Court, and it is a substantial

federal question that this Court should resolve in favor of Comstock.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Reply Memorandum have been served on Mr. Michael Driscoll, County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002, by certified mail, return receipt requested, on the 18 day of March, 1986.

James Bruce Bennett

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